DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-189168 DATE: November 30, 1977

MATTER OF: Reaction Instruments, Inc.

DIGEST:

1. Where the only basis contracting officer has for suspecting error in bid is disparity with other bid and Government estimate, request for reformation of contract due to alleged mistake in bid claimed after award cannot be allowed where contracting officer adequately discharged bid verification duty by calling to bidder's attention variance between its bid and only other bid.

2. Contract is not unconscionable where difference between low bid and Government estimate is not so great that Government can be said to be "obviously getting something for nothing" and nothing in record suggests that the Government realized it was getting "something for nothing," in view of low bidder's technical approach and manufacturing process.

On the basis of mistakes in bid alleged after award, Reaction Instruments, Inc. (Reaction), requests reformation of its contract, No. DOT-FA75WA-3645, issued by the Federal Aviation Administration (FAA), Washington, D. C.

Reaction's vice president was present at the bid opening on April 1, 1975, when Reaction submitted the low bid of $429,000 for a quantity of 60 Doppler VOR distributor assemblies, on-site spares and other support items. The only other bid was submitted by Wilcox Electric, Inc. (Wilcox), for $1,299,999. And although FAA had an estimate for the contract of $543,850, this estimate was never revealed to the bidders by the contracting officer.

At bid opening, the contracting officer noted the great disparity between the two bids and orally requested Reaction to review its bid prices. Later that same day, Reaction's vice president informed the contracting officer by telephone that Reaction's prices were correct. However, on April 3, 1975, the contracting officer made a further request in writing for price verification of the bid prices. Reaction replied in writing on April 4, 1975, and stated that the "prices under the subject solicitation remain valid."

Despite these assurances from Reaction, the FAA still had doubts as to the reasonableness of the bid prices, and an engineering opinion on the reasonableness of Reaction's prices was requested. The analysis submitted to the contracting officer, and later to the FAA's Contract Review Board, concluded that Reaction's prices were reasonable in light of both its technical approach and its manufacturing process. Therefore, based on these memoranda, as well as Reaction's oral and written verifications, the contracting officer accepted the bid, and the contract was awarded on May 29, 1975.

It was not until Reaction had completed the initial development phase of the contract and had begun to make estimates of its production costs that the alleged errors in the bid were first discovered. At that stage, Reaction's new vice president had reason to review the pricing, and it was then that a review of the worksheets revealed an apparent transposition of bid figures from $6,400 per unit on item 1 to $4,600 per unit. Moreover, Reaction's bid for item 3, the Spares, was affected by this error on item 1 so that instead of a bid of $2,240 per unit on item 3 the bid offered was only $1,598 per unit. In addition, Reaction failed to include the costs for the required Quality Assurance Test Program. It estimates the cost of this testing to be $49,830, which breaks down to an additional cost of $830.50 per unit for item 1. Reaction estimates the total amount of its errors to be $196,350, making the adjusted bid price to be $625,350.

These alleged errors were set out in detail in a sworn affidavit by the president of Reaction, and this request was filed on May 24, 1977, almost 2 years after the original contract award. Reaction now seeks permission to correct these alleged errors in the aforementioned amounts and to have our Office direct the FAA to grant a reformation of the subject contract by increasing the prices of item 1 and item 3 by $157,830 and $38,520, respectively.

Reaction's first argument in support of this request is that no valid or binding contract was ever effected at the bid prices because the contracting officer failed in his verification duty by neglecting to call to Reaction's attention the suspected mistake.

The general rule applicable to a mistake in bid alleged after award is that the sole responsibility for preparation of a bid rests with the bidder, and where a bidder makes a mistake in bid it must bear the consequences of its mistake unless the mistake is mutual or the contracting officer was on actual or constructive notice of error

prior to award. See Peterson, Windham & Yaughn, Inc., B-186359, January 12, 1977, 77-1 CPD 20; Boise Cascade Envelope Division, B-185340, February 10, 1976, 76-1 CPD 86; Autoclave Engineers, Inc., B-182895, May 29, 1975, 75-1 CPD 325. Since in the present case the contracting officer had reason to believe that a mistake had been made prior to the award, he was obligated under Federal Procurement Regulations (FPR) § 1-2.406-1 (1964 ed. circ. 1) to "* * * request from the bidder a verification of the bid, calling attention to the suspected mistake * * *."

Reaction argues that the contracting officer failed in his verification duty because, although he requested price verification, he neglected to call attention to the suspected mistake. However, the contracting officer in the present case actually requested verification from Reaction twice, once orally at the bid opening and again 2 days later in writing. Both times these requests were directed to Reaction's vice president, who, having been present at the bid opening, had just as much, if not more, reason to suspect mistake as did the contracting officer. See Atlas Builders, Inc., B-186959, August 30, 1976, 76-2 CPD 204.

Therefore, since Reaction's alleged errors were not apparent or capable of being discovered from the bid, the contracting officer had no basis for suspecting the specific nature of the possible errors. Consequently, the contracting officer's verification duty was adequately discharged when it was brought to Reaction's attention that the possibility of error existed due to the disparity between its bid and Wilcox's. See Creative Printing, Inc., B-187441, November 12, 1976, 76-2 CPD 405; Atlas Builders, Inc., supra; Boise Cascade Envelope Division, supra.

Although in retrospect the FAA should have revealed its estimate to the bidders to allow them a more complete view of the bidding process, its failure to do so was not fatal to a valid contract award at the prices bid. From the record, it appears unlikely that knowledge of the Government's estimate would have shaken Reaction's confidence in the correctness of its own bid. Moreover, Reaction's claims that it did not understand the price verification process and that it never verified its price but merely stated that its prices "remain valid" have little weight in light of Reaction's admitted experience in contracting with the Government.

In the alternative, Reaction contends that, notwithstanding verification of the bid, acceptance of its "exceedingly low bid" resulted in an unconscionable contract and that relief should be granted on that ground, citing Yankee Engineering Comp. , Inc., B-180573, June 19, 1974, 74-1 CPD 333.

The general rule expressed in Yankee Engineering, supra, is that, notwithstanding verification of the bid or the extent thereof, acceptance of an exceedingly low bid results in an unconscionably priced contract where the mistake in bid was so gross that it could be said that the Government "was obviously getting something for nothing." See also 53 Comp. Gen. 187 (1973).

Here, Reaction argues that the mistakes in its bid were so gross that the FAA is "obviously getting something for nothing." We cannot agree. Although it is true that there was a great disparity between Reaction's bid and Wilcox's, the difference between Reaction's bid and the FAA estimate was only about 21 percent. While there is no exact quantitative definition of the magnitude of mistake required to qualify under the test of Yankee Engineering, see discussion in Creative Printing, Inc., supra, the key to the issue of whether there is an unconscionable contract for which relief can be granted is whether the Government realized it was getting something for nothing. Porta-Kamp Manufacturing Co., Inc., 54 Comp. Gen. 546 (1974), 74-2 CPD 393. Here, the difference between Reaction's bid and the FAA estimate was not of sufficient magnitude to find that the Government was "obviously getting something for nothing," especially in view of Reaction's technical approach and manufacturing process. Also, there is no evidence in the record to suggest that the Government realized that it was getting something for nothing. See Creative Printing, Inc., supra; Porta-Kamp Manufacturing Co., supra. Therefore, enforcement of Reaction's contract at the agreed upon price is not unconscionable.

Accordingly, the award to Reaction at its bid price consummated a valid and binding contract, and, therefore, the request for contract reformation must be denied.

Deputy Comptroller General
of the United States